IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO. 1775 OF 2007

Mr. Laxman Dhanji Senghani ..Petitioner
Vs.
Mr. Ishwar Patel - Constituted Attorney to Mrs.Champaben Patel and ors. ..Respondents

Mr. V.N. Tayade for petitioner.
Mr. D.P. Adsule, APP for State.

CORAM: B.H. MARLAPALLE, J.

Date : September 19, 2007.

P.C.:

1. Heard Mr. Tayade the learned counsel for the petitioner who is an accused in Criminal Case No.361/SS/2004 filed under Section 138 of the Negotiable Instruments Act, 1881. Said complaint was filed by the Constituted Attorney of the payee and he stepped in the witness box, filed the pursis for closing of evidence and then submitted an application purported to be under Section 311 of Cr.P.C. seeking leave of the court for examining the payee herself. This application has been allowed by the impugned order dated 16/08/2007.

2. The learned Metropolitan Magistrate noted that the witness sought to be examined is the payee herself and though the application was filed belatedly no prejudice would be caused to the accused by examining the payee and he turned down the allegation that the application is filed to fill in the lacuna. This court has held that a complaint under Section 138 of the Negotiable Instruments Act, 1881 can be initiated by the Constituted Attorney and whether he is a competent witness or not on behalf of the payee depends on the facts of each case. On the face of this well settled position in law, it cannot be said for sure that the application was filed for filling in the lacuna. The learned Magistrate has imposed costs of Rs.500/- against the complainant and to be paid to the accused on account of delay.

3. The view taken by the learned Metropolitan Magistrate cannot be termed as perverse or grossly erroneous and hence the petition is rejected summarily.

(B.H. Marlapalle,J.)